

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

74-2306
B

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

IN THE MATTER

OF

FAS INTERNATIONAL, INC.,
Debtor.

UNITED STATES TRUST COMPANY OF NEW YORK,
Successor Indenture Trustee-Appellant,

FAS INTERNATIONAL, INC.,
Debtor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

WHITMAN & RANSOM
Attorneys for Appellant
522 Fifth Avenue
New York, New York 10036
(212) 575-5800

LEVIN & WEINTRAUB
Co-Counsel for Creditors Committee
225 Broadway
New York, New York 10007
(212) 766-9555

KRAUSE HIRSCH & GROSS
Attorneys for Debtor-Appellee
41 East 42nd Street
New York, New York 10017
(212) 986-1122



(4443)

PAGINATION AS IN ORIGINAL COPY

INDEX

	<u>Page</u>
Docket Entries.....	1a
Application for Allowance - U.S. Trust.....	5a
Application for Allowance - Whitman & Ransom.....	11a
Section 8.06 of the Indenture Dated As of January 1, 1969.....	23a
Article 13 of the Indenture Dated As of January 1, 1969.....	24a

Appellant's Exhibits

1. Letter to Honorable Murray I. Gurfein from the attorneys for the Indenture Trustee dated August 26, 1974.....	28a
2. Letter to Salvatore Ado no from Referee Roy Babbitt dated October 22, 1973.....	30a
3. Letter to Salvatore Adorno from Michael J. Crames dated October 22, 1973.....	31a
4. Letter to Honorable Murray I. Gurfein from the attorneys for Debtor and Co- counsel for Official Creditors Committee dated August 26, 1974.....	32a
5. Letter to Jack Gross from Edward Fein, dated November 6, 1973.....	34a
6. <u>In the Matter of Straus-Duparquet, Inc.</u> No. 65 B 181 (S.D.N.Y. May 10, 1966.).....	37a
7. <u>In the Matter of Fotochrome, Inc.</u> 70 B 209 (E.D.N.Y. 1972).....	43a
Decision and Order of the Referee in Bankruptcy.....	46a
Decision and Order of the United States District Court.....	52a
Notice of Appeal to the United States Court of Appeals.....	64a

By order of the Referee 12-10-72
In the Matter

DOCKET NO.

72 B 129

SECTION	CHECK IF ON FILED	Voluntary
	72	Involuntary
		Revolving Credit
		Corporation
		Farmer
OCCUPATION	(Check one)	Employee
		Professional
		Other (Non-business)
		Merchant
		Manufacturer
		Other Business
DATE DISMISSED		CHAPTER UNDER WHICH CASE WAS PENDING WHEN DISMISSED

of
 FAS INTERNATIONAL, INC., f/k/a
 FAMOUS ARTISTS SCHOOLS, INC.,
 FUTURE RESOURCES AND DEVELOPMENT, INC.
 f/k/a FUTURE DEVELOPMENT & RESOURCES, INC.
 FAMOUS SCHOOLS OF WESTPORT, INC.
 FAMOUS ARTISTS CARTOON COURSE, INC.,
 FAMOUS ARTISTS PAINTING COURSE, INC.,
 HOSTESSES OF AMERICA, INC.,
 FAMOUS ARTISTS SCHOOLS, CANADA, LTD.,
 FAMOUS MUSICIANS SCHOOL, INC., f/k/a
 FAMOUS SCHOOLS OF MUSIC,
 FAMOUS WRITERS SCHOOL, INC.,
 FAMOUS ARTISTS SCHOOL, INC., f/k/a
 FAMOUS SCHOOLS, INC.,
 FAMOUS PHOTOGRAPHERS SCHOOL, INC.,
 GUARANTEED COLLECTIONS, INC.,

DE
CON

FREE Easy Exchange

SECURED	UNSECURED
	5

REG-1122

Debtors.

RECEIVER	
ATTORNEY FOR RECEIVER	
TRUSTEE	
ATTORNEY FOR TRUSTEE	

CHANGES OF PRINCIPALS

DATE	PROCEEDINGS
Feb. 8-72	Filed petition, list of creditors, advt. in compliance with Rule XI-2-B - referred to Referee Babitt
2-10-72 4-21-72	Filed certified copy of order for continuation of business. Filed schedules, Statement of affairs, Statement of Executory Contracts (5C)
8-1-72	Filed Referee's certified copy of order grant leave to amend schedule A-3.
10-4-72	Rec'd from Referee copy of proposed plan of arrangement. Dated 9-29-72.
12-22-72	Filed certified copy of Referee's order dated 12-18-72, consolidating 72 B 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, and 139, with this proceeding and changing title.

FORM BK 74
SEP. 1962

UNITED STATES DISTRICT COURT
BANKRUPTCY DOCKET - COPY

CHECK THIS BOX IF FILING FEES WERE
PAID IN FULL AT TIME OF FILING

5-15-73 Filed Notice of Change of Address of Wachtell, Lipton, Rosen, Katz
attys for Claimant Nederlandse Credietbank, NV. 299 Park Ave
NYC 371-9200 also attys for Banque de Commerce

5-21-73 Filed certified copy of Referee's order amending schedule A-3. Dated 5-15-73.

5-31-73 Filed certified copy of Referee's order that arrangement as proposed by
debtor to its creditors on 9-29-73 is amended to read as follows*****
Dated 5-29-73.

8-6-73 Filed waivers and affidavits in re confirmation.
8-6-73 Rec'd from Referee copy of application in re confirmation.
8-6-73 Filed certified copy of Referee's order of confirmation.

11/2/73 Received from Bankruptcy Judge NOTICE OF APPEAL, United States
Trust Company of New York, etc. re: issuance of \$16,500.00 of 5%
Convertible subordinated debentures etc. from order of BANKRUPTCY
JUDGE, BABITT entered on: 9/25/73 denying such indenture trustee
compensation etc. by: Whitman and Ransom, attorneys for Appellant,
Dated: 10/19/73. RET. NOVEMBER 27th, 1973 at 10:30 A.M. in Room 506.

11/20/73 Received from Bankruptcy Judge, Amended designation of contents
of record on appeal and statement of issues to be presented on
appeal - re Order of HON. ROY BABITT, DATED: 9/26/73 etc. by:
Dunnington, Bartholow and Miller, attorneys for Appellant, ARTHUR
ANDERSEN & CO. DATED: 10/26/73.

11/20/73 Received from Bankruptcy Judge, Designation of contents of Record
on Appeal and statement of issues ; to be presented on appeal by:
Dunnington, Bartholow and Miller, attorneys for Appellant, ARTHUR
ANDERSON & CO. DATED: 10/15/73.

11/20/73 Received from Bankruptcy Judge, NOTICE OF APPEAL TO DISTRICT
COURT. - re Order of Bankruptcy Judge entered on: 9/26/73 on the
application of ARTHUR ANDERSEN & CO. etc. By: Dunnington, Bartholow
and Miller, attorneys for Appellant, ARTHUR ANDERSEN & CO. DATED:
10/5/73. RET. DECEMBER 18TH, 1973 at 10:30 in Room. No. 509, TUES.

12/13/73 Filed Memorandum of ARTHUR ANDERSEN & CO. in support of its appeal
from the order fixing its allowance herein. submitted by: Dunnington,
Bartholow and Miller, attorneys for A. Andersen & Co. 161 E. 42nd St.
NYC 10017. OPINION NO. 40187

1/8/74 Filed MEMORANDUM, which reads in part.... The petition is allowed
and the order of 9/26/73, will be modified upon remand to allow
the sum claimed except for the said amount of \$3,973.00 SO ORDERED
JUDGE FRANKEL, DATED: 1/8/74. (SEE MEMORANDUM FOR FULL DETAILS)
COPY TO BANKRUPTCY JUDGE.

3/15/74 Filed Brief of appellant, U.S. Trust Company of New York as
successor indenture trustee. by: Whitman and Ransom, attorneys for
Appellant, dated: 3/14/74.

CONTINUED ON PAGE 3.

B

DATE	DOCKET NUMBER
	PROCEEDINGS
3/19/74	Filed Stipulation adjourning hearing from 3/19/74 to 4/23/74.Dated:3/18/74 - COPY TO BANKRUPTCY JUDGE.
3/19/74	Filed MEMO-ENDORSED.....The foregoing appeal having been repeated adjourned and no party having appeared this date, the appeal is dismissed - SO ORDERED,JUDGE MOTLEY,DATED:3/19/74.COPY TO BANKRUPTCY JUDGE BABIT.
4/1/74	Filed Order vacating order dated:3/19/74 dismissing the appeal from the order of Judge Babitt.Appeal of U.S. Trust Co. of N.Y. will be heard on:4/23/74.JUDGE MOTLEY, DATED:3/28/74.COPY TO BANKRUPTCY JUDGE.
4/24/74	Filed Stipulation adjourning hearing re:Appeal from April 23rd,1974 to:May 14th,1974.JUDGE PIERCE,DATED: 4/23/74.
6/6/74	Filed BRIEF of interested Banks and Trust Companies as Amici Curiae (Amici Curiae, in support of the U.S. Trust Company's appeal from the order dated:9/25/73,HON. ROY BABITT)sub. by:Kelley Drye Warren Clark Carr and Ellis,by: Edward Roberts,III,(member of firm) and special counsel for Bankers Trust Co,Chemical Bank,First National City Bk,etal Dated:6/5/74.
8/26/74	Filed OPINION NO. 41115 (Whitman and Ransom,attys.for appellant appeal from an order of Bankruptcy J.Babitt, denying them allowances upon the confirmation of an arrangement etc.)...On petition for review, the decision of the Bankruptcy Judge is confirmed.JUDGE GURFEIN,DATED: 8/26/74.COPY TO BANKRUPTCY JUDGE,BROWN FOLDER RETURNED. <u>SEE OPINION FOR FULL DETAILS :</u>
9/25/74	Filed NOTICE OF APPEAL to the U.S. Court of Appeals for the Second Circuit from the order of Judge Gurfein, District Judge entered in this case on August 26, 1974. Mailed Notices. (6)
9/25/74	Filed Bond Undertaking for Costs on Appeal in the amount of \$250.00on behalf of FAS International, Inc.
*** 8/26/74	Filed BRIEF OF APPELLEE re:granting of allowances to indenture trustee,etc.sub. by:Krause,Hirsch and Gross, attys. for Debtor.Dated:7/11/74.
8/26/74	Filed REPLY BRIEF of appellee states that appellee's assertion that no agreement oral or written was ever made for the payment by the debtor of legal fees of counsel for the indenture trustee,etc.sub. by:Whitman and Ransom,attys for indenture trustee.Dated:8/20/74.

CONTINUED ON PAGE 4.

PROCEEDINGS

6/74

Filed MEMORANDUM in support of the application of Whitman and Ransom as attys. for United States Trust Co. of New York. indenture trustee re:allowances. sub. by:Whitman and Ransom, attys. for indenture trustee Dated:8/17/73 ?.

APPLICATION FOR ALLOWANCES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In the Matter

-of-

: In Proceedings for
Arrangement

FAS INTERNATIONAL, INC., : No. 72 B 128

Debtor.

: APPLICATION FOR ALLOWANCES

-----x
TO: THE HONORABLE ROY BABITT
REFEREE IN BANKRUPTCY

The Application of United States Trust Company of New York, Indenture Trustee ("UST") respectfully represents:

That your Applicant is Successor Trustee under an Indenture Agreement dated as of January 1, 1969 (the "Indenture") between the Debtor (then known as Famous Artists Schools, Inc.) and Manufacturers Hanover Trust Company as Trustee, with respect to the issuance by the Debtor of \$16,500,000 of 5% Convertible Subordinated Debentures due 1989.

Applicant has already filed a general unsecured claim for services rendered up to and including February 7, 1972. The Debtor filed a petition for arrangement on February 8, 1972.

On February 8, 1972 Applicant through its attorneys, Whitman & Ransom, served a Notice of Acceleration on the Debtor accelerating payment of all of the debentures by virtue of the Debtor's failure to pay the debentureholders interest on such debentures on January 1, 1972. In accordance with the terms of

APPLICATION FOR ALLOWANCES

the Indenture, your applicant sent notice of such acceleration to all of the registered debentureholders which at that time numbered 584. Under Applicant's internal procedure all debentureholders who resided outside the New York metropolitan area were sent such notice by Airmail.

Subsequent to such notice, officers of your applicant namely Messrs. Sinclair Armstrong Executive Vice President of your applicant, Malcolm Hood, Senior Corporate Trust Officer of your applicant and George Boswell, Second Corporate Trust Officer of your applicant met with applicant's counsel and discussed what steps would be necessary by applicant to protect the debentureholders. It was determined that a letter would be sent to all debentureholders advising them of developments to date and enclosing a proof of claim form to be filled out by each debentureholder with a power of attorney running to officers of UST and partners of applicant's counsel to vote the claims for the election of a creditors' committee which would include the larger debentureholders. An up-to-date list of debentureholders was obtained by your applicant from Manufacturers Hanover Trust Company, the debenture registrar (the "registrar") and proofs of claim form for each of the debentureholders were prepared by the corporate trust department and mailed to such debentureholders with a letter from your applicant advising the debentureholders of their rights and requesting them to fill out the few remaining blanks on the proofs of claim form. Again those debentureholders residing in the New York metropolitan area were mailed such proof of claim forms by regular mail while all other debentureholders

APPLICATION FOR ALLOWANCES

received their letters and proof of claim forms by Airmail.

Subsequent to the mailing, the proof of claim forms were received back from the debentureholders. In each case the proof of claim form was examined and logged. Moreover your applicant received innumerable phone calls from debentureholders asking questions not only about the material contained in the letter and the proof of claim form, but in addition about the problems of the Debtor. All correspondence received by your applicant from debentureholders was promptly answered and all telephone calls were answered as well. This work was handled by Mr. Hood, Mr. Boswell and Miss Irene Scocca who is also a Corporate Trust Officer.

Subsequent to this mailing, Mr. George Boswell appeared in Court and testified on behalf of the debentureholders at a hearing held on March 14, 1972.

Thereafter periodic telephone calls took place between corporate trust officers of your applicant and its counsel and continual calls and letters were received by your applicant from debentureholders, all of which were promptly answered. During September of 1972 meetings were held between your applicant and its counsel with respect to the plan of arrangement which had been negotiated by your applicant's counsel. Lengthy consideration were given to these proposals and these proposals were accepted by your applicant. Thereafter your applicant worked with counsel to prepare a letter to all of the debentureholders recommending approval of the plan of arrangement. Once again your applicant mailed a letter to all of the debentureholders

APPLICATION FOR ALLOWANCES

analyzing the plan of arrangement and recommending its approval. After this letter went out numerous letters and phone calls were received, all of which were answered and a large number of consents were similarly received, even though the letter had directed that such consents be sent to the debtor.

During the entire proceeding, of course, claim forms continued to be received by your applicant and all of these claim forms were examined and duly logged. Ultimately the log and the claim forms were all turned over to your applicant's counsel.

Your applicant does not keep time records with respect to its employees either in the corporate trust department, the mail room or any of the employees working in other departments and consequently is unable to state the number of hours devoted to this matter by officers and employees of your applicant. Moreover applicant does not keep separate records with respect to any specific mailing. However, based on the knowledge of the officer signing this application, the allowance of \$2,500 requested would still represent a very substantial loss to your applicant.

In view of the agreement of the attorneys for the Debtor, the attorneys of the creditors committee and applicant's own counsel to reduce the amount of allowances requested and in order to assist the debtor in fulfilling the terms of its plan of arrangement which will be of benefit to the debentureholders, your applicant consents to a reduction of its allowances from \$2,500 to \$2,000. Up to the present time, applicant has

APPLICATION FOR ALLOWANCES

received no compensation for any services rendered in connection with this proceeding.

UNITED STATES TRUST COMPANY
OF NEW YORK

By s/ Malcolm J. Hood
Malcolm J. Hood
Vice President

APPLICATION FOR ALLOWANCES

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MALCOLM J. HOOD, being duly sworn, deposes and says that he is the Vice President of UNITED STATES TRUST COMPANY OF NEW YORK, the applicant in the foregoing application and does hereby make solemn oath that the statements contained therein are true according to the best of deponent's knowledge, information and belief; that the reason this verification is made by deponent and not by the applicant is that said applicant is a corporation; and that deponent is an officer of the corporation duly authorized by its Board of Directors to execute and verify said application on its behalf.

s/ Malcolm J. Hood

MALCOLM J. HOOD

Sworn to before me this

day of August, 1973.

Notary Public

APPLICATION FOR ALLOWANCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In the Matter

: In Proceedings for Arrangement

-of-

No. 72 B 128

FAS INTERNATIONAL, INC.,

: APPLICATION FOR ALLOWANCE

Debtor.

-----x

TO: THE HONORABLE ROY BABITT:
REFEREE IN BANKRUPTCY

The application of Whitman & Ransom ("Applicant"),
attorneys for the United States Trust Company of New York,
Indenture Trustee ("UST") respectfully represents:

On January 10, 1969 the Debtor (then known as Famous
Artists Schools, Inc.) entered into an Indenture Agreement dated
as of January 1, 1969 with the Manufacturers Hanover Trust Com-
pany as Trustee (the "Indenture") with respect to the issuance
by the Debtor of \$16,500,000 5% Convertible Subordinated Debent-
tures due 1989. These debentures were sold to the public and,
on the date of the filing by the Debtor of its petition for
arrangement, the debentures were in the hands of approximately
584 individual debentureholders. On January 12, 1971 UST
succeeded Manufacturers Hanover Trust Company as Trustee
under the Indenture.

By the fall of 1971 it was clear that the Debtor was in
financial difficulties. An article appeared in the Wall Street

APPLICATION FOR ALLOWANCE

Journal indicating that a reaudit of the books and records of the debtor showed a loss of \$55,000,000 over and above the approximate \$2,000,000 loss set forth in the previous financial statements. On November 16, 1971, the Debtor met with representatives of UST and proposed the exchange of debentures for stock indicating that, if 90% of the debentureholders would make the exchange, the Debtor was of the opinion that the other holders of the long term debt would be willing to make a similar exchange. The Debtor however refused to pay interest which was then accruing and would fall due on January 1, 1972.

On December 28, 1971 the Debtor sent out a 22 printed page plan of debt restructuring and recapitalization. Meetings were held by the Debtor in January of 1972 with representatives of the overseas banking institutions and members of the domestic bank consortium. UST was asked to consent to the plan, but the Debtor refused to make the interest payment. On February 8, 1972 Applicant sent the Debtor a letter on behalf of UST declaring the total debenture issue of \$16,500,000 immediately due and payable. On that same day, February 8, 1972, without the knowledge of Applicant or UST, the Debtor was filing its petition for arrangement.

The Debtor then sent out a notice of a meeting of the larger creditors. No debentureholder nor UST was invited to such meeting, and neither Applicant nor UST knew that such a notice had gone out. Applicant subsequently learned that at that meeting the creditors organized themselves into a committee completely excluding the debentureholders. When Applicant

APPLICATION FOR ALLOWANCE

subsequently called counsel for the Debtor and inquired as to why the debentureholders had not been invited, Applicant was advised that the debentureholders were "wholly subordinated" and therefore had nothing to say. Following the organization of the creditors' committee the Debtor continued to meet with the committee prior to the first meeting of creditors to discuss the Debtor's operation and to ask for various interim relief such as permission to borrow money on certificates of indebtedness. No debentureholder nor UST was invited to any of those meetings. Applicant continued to keep abreast of developments in the proceeding by making various telephone calls to counsel for the Debtor or to counsel for the unofficial creditors' committee or to counsel to the bank consortium. Your Applicant then advised UST of these developments. A meeting was then called by UST with James C. Sargent and William M. Kahn, both members of Your Applicant, to discuss what steps might be taken by UST to protect the interests of the debentureholders which were clearly being neglected by all of the other parties. In summary it was determined that a letter would be sent to all debentureholders advising them of developments and enclosing a proof of claim form to be filled out by each debentureholder, with a power of attorney running to officers of UST and members of your Applicant to vote the claims for the election of a creditors' committee which would be comprised not only of representatives of the bank consortium, the trade creditors, and other individual large debt holders, but would include debentureholders as well and further to vote for the election of Malcolm

APPLICATION FOR ALLOWANCE

Hood, Senior Corporate Trust Officer of UST as a tentative trustee.

On March 3, 1972 the letter was mailed to the debentureholders and between March 3rd and March 14th, 1972 your Applicant received a number of calls from debentureholders and conferred continually with officers of UST with respect to claims which were being received. Your Applicant also researched the law with respect to the rights of the debentureholders to vote at the election and also with respect to the terms of the subordination set forth in Section 13.02 of the Indenture. On March 14, 1972 a hearing took place before Referee Roy Babitt for virtually the entire day in which your Applicant participated on behalf of the debentureholders. Following such hearing further research was performed and briefs and exhibits were prepared and submitted to the Court.

The result of this action taken by your Applicant on behalf of the debentureholders bore immediate fruit. Copies of orders and applications submitted to the Court were sent to your Applicant for perusal. Your Applicant was invited to the meetings between the creditors' committee and the debtor and took an active role in working with the representatives of the creditors' committee and the representatives of the Debtor in working out an adjustment which would be beneficial to all parties. Your Applicant continued to advise UST and any and all debentureholders who called of all developments.

After this Court ruled that the unofficial creditors' committee and the tentative trustee proposed by the consortium

APPLICATION FOR ALLOWANCE

and the trade would be made official and that the debentureholders (who had proved claims in an amount less than those proved at the first meeting by the bank consortium and the trade creditors) would be considered as having cast only one vote, your Applicant then obtained extensions of time to review this decision of the Court. During that time, however, negotiations commenced between the Debtor and all of its creditors and the debentureholders with respect to a plan of arrangement.

After some negotiation an oral agreement was reached between counsel for the debtor, counsel for the creditors' committee, counsel for the bank consortium and your Applicant with respect to an overall settlement of all issues.

That settlement for the debentureholders consisted of three separate considerations. The first consideration was that the debentureholders were to receive 196,092 shares of the common stock of the Debtor which number of shares were to represent approximately 20% of all of the issued and outstanding shares of the Debtor upon the completion of confirmation and the additional steps incident thereto. The second consideration was that an officer of UST was to be one of the five directors of the reorganized Debtor to act on behalf of the debentureholders. The third consideration was that the expenses of UST, including legal fees, incurred by UST in connection with the Chapter XI proceedings were to be paid by the Debtor subject to the approval of this Court. The reason that this last consideration was requested and granted was that the consideration being paid to the debentureholders was exclusively in shares and consequently

APPLICATION FOR ALLOWANCE

there would be no fund out of which UST would be able to pay expenses including its counsel. At the time that this conversation took place your Applicant raised the question as to whether there was any legal prohibition against this Court awarding your Applicant such counsel fees. No one present was able to answer this question with any certainty, but expressed the general belief that probably such award could be made if no objection to such award were made either by the debtor or by the creditors and it was agreed that no such objection would be made. Your Applicant was asked to estimate the total amount of legal fees which would be requested and your Applicant then stated that no exact amount could be known but that in all probability the fees would be approximately \$10,000. This estimate was based on the fact that the meeting referred to took place on June 16, 1972 and the representatives of the consortium, creditors' committee and the Debtor had all agreed to the overall terms of the plan of arrangement and expected an early fall, 1972 confirmation. The substantial problems which ensued subsequent to this meeting were not and could not have been foreseen either by your Applicant or by other representatives of the Debtor and creditors' committee present at that June 16, 1972 meeting.

It is interesting to note that in private discussions between your Applicant and certain of the counsel present at the June 16, 1973 meeting, it was conceded by such counsel that the reason that the debentureholders had achieved such an excellent settlement (general creditors were receiving one

APPLICATION FOR ALLOWANCE

share of the debtor for approximately \$83 of the indebtedness while the debentureholders were receiving one share of the debtor for approximately \$41 of indebtedness) was the fact that your Applicant at the hearing before the Court on the election of the creditors' committee had pointed out that the language of the subordination set forth in Section 13.02 of the Indenture created a very serious question as to whether the debentureholders were subordinated at all if the consideration distributed to the creditors under the plan of arrangement consisted of shares of stock of the debtor as reorganized. Such counsel also conceded that, when the plan was originally formulated, the debentureholders were virtually excluded from receiving any consideration. However, as discussions developed all parties agreed that, in view of the serious questions raised by Applicant and the virtual certainty of objections and appeals which would be made or taken by Applicant if the debentureholders were not given a larger consideration, it was determined that the only feasible way of confirming any arrangement in the foreseeable future was to approve the payment to the debentureholders of the shares of the Debtor which appear in the plan of arrangement which was confirmed.

Subsequent to the June 16, 1972 meeting your Applicant met with counsel for the Debtor, counsel for the bank consortium and counsel for the trade creditors. Based on those meetings and the study of the financial information elicited at such meetings, Applicant prepared a presentation to be made by Applicant to UST. Meanwhile the Applicant continued to obtain extensions of

APPLICATION FOR ALLOWANCE

UST's time to review this Court's decision on the election of the Trustee. Applicant then met with Mr. J. Sinclair Armstrong, Executive Vice President of UST and with Malcolm J. Hood, Senior Corporate Trust Officer of UST, and after lengthy questioning and discussion Mr. Armstrong and Mr. Hood agreed that the settlement worked out by your Applicant referred to above was not only satisfactory but as good a proposal as might be expected under all of the circumstances. Your Applicant was therefore instructed to accept the proposal on behalf of the debentureholders. Your Applicant then permitted the time to review this Court's decision to run out in accordance with the agreement which your Applicant made with counsel for the other parties in this proceeding.

Your applicant then performed the necessary work of going over all drafts of the plan of arrangement and making suggestions and corrections and attending meetings with respect to problems arising with such drafting. It should also be pointed out at this juncture, though it breaks the chronology of this application, that your Applicant similarly examined and commented on the proxy material which was ultimately sent to the shareholders, the creditors and the debentureholders, as well as the solicitation of consents from the general creditors and naturally the solicitation of consents from the debentureholders and all of the relevant exhibits annexed to such material. In addition, your Applicant prepared a lengthy letter on behalf of UST to all of the debentureholders commenting on all of the material which they were receiving from the Debtor giving instruc-

APPLICATION FOR ALLOWANCE

tions and making recommendations.

In August of 1972 a new problem arose in that the Securities and Exchange Commission indicated that it was considering making a motion under Section 328 of the Bankruptcy Act to move the proceeding into Chapter X. A meeting of counsel took place, including your Applicant, and on August 31, 1972 your Applicant attended a meeting at the SEC with all other counsel in the proceeding and Mr. Marvin Jacobs of the Commission. Your Applicant, as well as other counsel, pressed the SEC not to make such a motion and joined in the general discussion and arguments. On September 6, 1972 a meeting of all counsel was held at the office of Michael Crames, Esq., co-counsel to the creditors' committee at which meeting the subject of what further steps could be taken with respect to the SEC's position was discussed. Your Applicant was requested to prepare a short memorandum touching on all of the cases relating to the question of under what condition an SEC motion under Section 328 should be properly granted. Your Applicant performed the research and prepared such a memorandum, and subsequently reviewed and revised the material which was finally submitted to the SEC.

By now your Applicant was heavily engaged in working with the debtor on reviewing and sorting out all the consents which were being received by the debentureholders and comparing such consents with the claims which had been filed. Applicant was in continual touch with counsel for the Debtor with respect to straightening out the problems caused by the large number of

APPLICATION FOR ALLOWANCE

debentureholders who had filed claims, but who had not consented, and the large number of debentureholders who had consented but had not filed claims and in this connection your Applicant attended a meeting with other counsel in the Court's Chambers at which these problems were finally resolved.

The last category of work performed by your Applicant related to a shareholders derivative suit brought by one Joan Rappo and others in the United States District Court, Southern District of New York. Although your Applicant took no part in the settlement between the Debtor and the plaintiffs and their counsel, your Applicant was active in insuring that the settlement did not affect the percentage of shares to be owned in the aggregate by the debentureholders after confirmation of the plan. In this connection it will be remembered that all of the shares issued by the Debtor in settlement of that derivative action will come out of the shares available for general creditors and since the debentureholders will receive some additional shares under that settlement, the position of the debentureholders in the aggregate has been improved by that settlement. Your Applicant also attended the hearing before Judge Pierce and argued in behalf of the approval of that settlement by the District Court.

Annexed to and made a part of this Application are the copies of the computer runout showing the time records kept by your Applicant in connection with this matter. These records show that as of June 30, 1973 partners of your Applicant put in a total of 292 hours and associates of your Applicant put in a total of 145.7 hours or a total basic time of \$31,935.70.

APPLICATION FOR ALLOWANCE

(Errors in the computer runout indicate that \$1,192.50 were improperly charged to the case, so the total time put in up to and including June 30, 1973 adds its to \$30,743.20). Time actually spent on this matter by Applicant during the months of July and August, which was substantial, does not appear on this computer runout.

In addition, your Applicant expended \$533.88 of their own funds in connection with this matter. To date your Applicant has not received any payment whatsoever from anyone.

Your applicant announced at the confirmation hearing that it was applying for an allowance of \$30,000. In view of the reductions made in the Applications for Allowance by the attorneys for the debtor-in-possession and the attorneys for the creditors' committee, your Applicant feels it incumbent upon it to reduce this application for allowance to the sum of \$25,000 plus the disbursements above mentioned.

In view of the results accomplished, it is believed that the requested allowance is not only fair and reasonable, but extremely modest.

Dated: New York, New York
August 10, 1973

WHITMAN & RANSOM
522 Fifth Avenue
New York, New York 10036
212 867-1700

By s/ William M. Kahn
A Member of the Firm

APPLICATION FOR ALLOWANCE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM M. KAHN, being duly sworn, deposes and says
that:

He is a partner in the firm of Whitman & Ransom, the
applicant herein.

He has read the foregoing Application for Allowance
and knows the contents thereof. That the same is true to his
own knowledge, except as to the matters stated to be alleged
upon information and belief, and as to those matters he be-
lieves it to be true.

/s/ William M. Kahn
WILLIAM M. KAHN

Sworn to before me this
13th day of August, 1973.

/s/ Patricia A. Cassese
Notary Public

Section 8.06 of the Indenture

SECTION 8.06. The Company covenants and agrees to pay to the Trustee from time to time, and the Trustee shall be entitled to, reasonable compensation (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) for all services rendered by it in the execution of the trusts hereby created and in the exercise and performance of any of the powers and duties hereunder of the Trustee, and the Company will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any of the provisions of this Indenture (including the reasonable compensation and the expenses and disbursements of its counsel and of all persons not regularly in its employ) except any such expense, disbursement or advance as may arise from its negligence or bad faith. The Company also covenants to indemnify the Trustee for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on the part of the Trustee, and arising out of or in connection with the acceptance or administration of this trust, including the costs and expenses of defending itself against any claim of liability in the premises. The obligations of the Company under this Section to compensate and indemnify the Trustee and to pay or reimburse the Trustee for expenses, disbursements and advances shall constitute additional indebtedness hereunder and shall survive the satisfaction and discharge of this indenture. Such additional indebtedness shall be secured by a lien prior to that of the Debentures upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the holders of particular Debentures.

Article Thirteen of the Indenture

ARTICLE THIRTEEN
SUBORDINATION OF DEBENTURES

SECTION 13.01. The Company covenants and agrees, and each holder of Debentures, by his acceptance thereof, likewise covenants and agrees, that the payment of the principal of (and premium, if any) and interest on each and all of the Debentures is hereby expressly subordinated, to the extent and in the manner hereinafter set forth, in right of payment to the prior payment in full of all Senior Indebtedness.

SECTION 13.02. If, upon any distribution, division or application, partial or complete, voluntary or involuntary, by operation of law or otherwise, of all or any part of the assets of the Company upon any dissolution, winding up, liquidation, readjustment or reorganization of the Company or its property, whether in bankruptcy, insolvency or receivership proceedings or at execution sale or upon an assignment for the benefit of creditors or any other marshalling of the assets and liabilities of the Company or otherwise, then, in any such case, the holders of all Senior Indebtedness shall first be entitled to receive payment in full of the principal thereof (and premium, if any) and the interest accrued and unpaid thereon before the holders of the Debentures are entitled to receive any payment upon the principal of (and premium, if any) or interest on indebtedness evidenced by the Debentures; and upon any such application, dissolution, winding up, liquidation, readjustment or reorganization, any payment or distribution of assets of the Company of any kind or character whether in cash, property or securities (other than shares of stock of the Company as reorganized or readjusted or securities of the Company or any other corporation provided for by a plan of reorganization or readjustment, the payment of which is subordinated to the payment of all Senior Indebtedness which may at the time be outstanding) to which the holders of the Debentures or the Trustee would be entitled except for the provisions of this Article shall be paid by the Company or the liquidating trustee or agent or other person making such payment or distribution, whether a trustee in bankruptcy, a receiver or

Article Thirteen of the Indenture

liquidating trustee or whosoever, direct to the holders of Senior Indebtedness or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Indebtedness may have been issued, ratably according to the aggregate amounts remaining unpaid on account of the principal of (and premium, if any) and interest on the Senior Indebtedness held or represented by each, to the extent necessary to pay in full all Senior Indebtedness remaining unpaid, after giving effect to any concurrent payment or distribution to the holders of such Senior Indebtedness; and in the event that, notwithstanding the foregoing, upon any such application, dissolution, winding up, liquidation, readjustment or reorganization, any payment or distribution of assets of the Company of any kind or character, whether in cash, property or securities (other than shares of stock of the Company as reorganized or readjusted or securities of the Company or any other corporation provided for by a plan of reorganization or readjustment, the payment of which is subordinated to the payment of all Senior Indebtedness which may at the time be outstanding) shall be received by the Trustee or the holders of the Debentures before all Senior Indebtedness is paid in full, such payment or distribution shall be paid over to the holders of such Senior Indebtedness or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Indebtedness may have been issued, ratably as aforesaid, for application to the payment of all Senior Indebtedness remaining unpaid until all such Senior Indebtedness shall have been paid in full, after giving effect to any concurrent payment or distribution to the holders of such Senior Indebtedness. Subject to the payment in full of all Senior Indebtedness, the holders of the Debentures shall be subrogated to the rights of the holders of Senior Indebtedness to receive payments or distributions of assets of the Company applicable to the Senior Indebtedness until the principal of (and premium, if any) and interest on the Debentures shall be paid in full and no such payments or distributions to the Senior Indebtedness shall, as between the Company, its creditors other than the holders of Senior Indebtedness, and the holders of the Debentures, be deemed to be a payment by the Company to or on account of the Debentures, it being understood that the provisions of this Article are and are intended solely for the purpose of defining the relative rights of the holders of the Debentures, on the one hand, and the holders of the

Article Thirteen of the Indenture

82

Senior Indebtedness, on the other hand, and nothing contained in this Article or elsewhere in this Indenture or in the Debentures is intended to or shall impair, as between the Company, its creditors other than the holders of Senior Indebtedness, and the holders of the Debentures, the obligation of the Company, which is unconditional and absolute, to pay to the holders of the Debentures the principal of (and premium, if any) and interest on the Debentures as and when the same shall become due and payable in accordance with their terms, or to affect the relative rights of the holders of the Debentures and creditors of the Company other than the holders of the Senior Indebtedness, nor shall anything herein or therein prevent the Trustee or the holder of any Debenture from exercising all remedies otherwise permitted by applicable law upon default under this Indenture, subject to the rights, if any, under this Article of the holders of Senior Indebtedness in respect of cash, property or securities of the Company received upon the exercise of any such remedy. Upon any application or distribution of assets of the Company referred to in this Article, the Trustee, subject (as between itself and the holders of the Debentures) to the provisions of Section 8.01 hereof, and the holders of the Debentures shall be entitled to rely upon a certificate of a trustee in bankruptcy, a receiver, a liquidating trustee or agent or other person making any distribution to the Trustee or to the holders of the Debentures for the purpose of ascertaining the persons entitled to participate in such distribution, the holders of the Senior Indebtedness and other indebtedness of the Company, the amount thereof or payable thereon, the amount or amounts paid or distributed thereon and all other facts pertinent thereto or to this Article.

SECTION 13.03. In the event and during the continuation of any Senior Indebtedness Default, no amount shall be paid by the Company, and neither the Trustee nor any holder of Debentures shall be entitled to receive any amount, in respect of the principal of, including the sinking fund (and premium, if any), or interest on any Debenture unless and until such Senior Indebtedness Default shall have been remedied; but such prohibition of payment shall not be construed as preventing the occurrence of an Event of Default under Section 7.01 hereof. Nothing contained in this Article Thirteen or elsewhere in this Indenture, or in any of the Debentures, shall prevent (a) the Company, at any time except as provided in the first sentence of this

Article Thirteen of the Indenture

§3

Section 13.03 or under the conditions described in Section 13.02 hereof, from making payments at any time of principal of, including the sinking fund (and premium, if any), or interest on the Debentures, or (b) the application by the Trustee or any paying agent of any moneys deposited with it hereunder by the Company to the payment of or on account of the principal of (and premium, if any) or interest on the Debentures if, at the opening of business on the second business day next preceding the date on which such moneys become due and payable, the Trustee or such paying agent did not have knowledge of any facts which otherwise would prohibit such application. Clause (b) of the preceding sentence shall be, and shall be construed, solely for the benefit of the Trustee or any paying agent, and shall not otherwise affect the rights of holders of such Senior Indebtedness.

Notwithstanding any of the provisions of this Article Thirteen, neither the Trustee nor any paying agent shall at any time be charged with knowledge of the existence of any facts which would prohibit the making of any payment of moneys to or by the Trustee, unless and until the Trustee shall have received, at its principal corporate trust office specified in section 16.04 written notice thereof from the Company or from the holder of Senior Indebtedness or from any trustee therefor. Subject (as between itself and the holders of the debentures) to the provisions of Section 8.01 hereof, the Trustee shall not be liable to the holders of Senior Indebtedness if it shall pay over or deliver to the holders of Debentures or the Company or any other person money or assets to which the holders of Senior Indebtedness shall be entitled by virtue of this Article Thirteen or otherwise.

SECTION 13.04. Each holder of Debentures by his acceptance thereof authorizes the Trustee in his behalf to take such action as may be necessary or appropriate to effectuate the subordination as provided in this Article and appoints the Trustee his attorney in fact for any and all such purposes.

SECTION 13.05. The Trustee shall be entitled to all the rights set forth in this Article in respect of any Senior Indebtedness at any time held by it to the same extent as any other holder of Senior Indebtedness, and nothing in Section 8.13 or elsewhere in this Indenture shall be construed to deprive the Trustee of any of its rights as such holder.

Letter to Hon. Murray I. Gurfein from Attorneys for the Appellant
dated August 26, 1974

WHITMAN & RANSOM

522 FIFTH AVENUE
NEW YORK, N.Y. 10036

212-575-5800

RICHARD JOYCE SMITH
J. VAN SICKLEN PARK
PATRICK H. SULLIVAN
CHARLES FRANCIS PREUSSE
PAUL E. DOHERTY
JAMES D. ANDERSON
HERBERT P. POLK
JAMES C. SARGENT
GEORGE J. NOUHAIN
JOHN A. PATERACKI, JR.
ROBERT C. O'BRIEN
DONALD L. WALLACE
ROBERT S. NEWMAN
DANIEL F. CALLAHAN
J. HERBERT PREM, JR.
J. BAY ROBINSON
J. KENDALL GILLETT, JR.
JAMESBALD H. CASHION
JOSEPH V. McCARTHY
CAROL LYTTLE, JR.
PAUL A. CABLE
WILLIAM D. HART, JR.
WILLIAM M. KAHN
JOHN S. TWOHEY, JR.
JUGALD CAMPBELL BROWN
ERALD D. O'RODEN
PAUL M. O'CONNOR, JR.
J. VAN ORDEN ONICHTEL
MARTIN RUBASHKIN
ETER D. LOWENSTEIN
UDITH A. GELB
OHN M. HADLOCK
ANES H. BELL

THOMAS T. HAYASHI
1977-1974

COLLEY E. WILLIAMS
DAVID J. COITON
CHARLES S. BANNERMAN
JOHN D. GRAY
CHRISTOPHER H. SMITH
COUNSEL

CABLE ADDRESSES
"WHITSON"
"GR"
"BENGOSHI NEW YORK"
TELEX 12 5109

1730 PENNSYLVANIA AVE. N.W.
WASHINGTON, D.C. 20006
202-296-6333

RESIDENT PARTNERS
JOHN S. MONAGAN
TALBOT S. LINDSTROM
ADMITTED IN THE
DISTRICT OF COLUMBIA
AND NOT IN NEW YORK

August 26, 1974
BY HAND

Honorable Murray I. Gurfein
United States District Judge
United States Courthouse
Foley Square
New York, New York

Re: FAS International, Inc.

Dear Judge Gurfein:

Due to statements made in the "Facts" section of
appellee's brief and the Reply Brief of the appellant in the
above matter pending before you, all counsel involved in the
above described appeal believe that no issue of fact exists
and that the facts are correctly set forth below.

1. The agreement alleged by the Indenture Trustee
arose as part of the settlement set forth in the Debtor's Plan
of Arrangement. At the time that such settlement was negotiated
the attorneys for the Indenture Trustee (appellant) requested
that as part of the settlement the Debtor pay the attorneys
fees of the Indenture Trustee. Counsel for the Debtor and
counsel for the Creditors Committee stated that though they
were personally willing to make such an agreement they believed
such an agreement was invalid. They also stated that they had
doubts whether or not the court as a matter of law had authority
to grant such an application but that they would not oppose
such an application if made by the Indenture Trustee.

2. The above sets forth in its entirety the agree-
ments alleged by the appellant.

3. The sole issue before you on this appeal is there-
fore one of law as to whether the Bankruptcy Court under all

Letter to Hon. Murray I. Gurfein from Attorneys for the
Appellant dated August 26, 1974
WHITMAN & RANSOM

Honorable Murray I. Gurfein

-2-

August 26, 1974

of the facts and circumstances of this Chapter XI proceeding and the facts set forth above should have granted the application for allowance by the Indenture Trustee for itself and for its counsel for services rendered in such proceeding.

Very truly yours,

WHITMAN & RANSOM
Attorneys for Indenture Trustee

By W.H. Ransom
A Partner

LEVIN & WEINTRAUB
Co-Counsel for Official
Creditor's Committee

By _____
A Partner

KRAUSE, HIRSCH & GROSS
Attorneys for Debtor

By _____
A Partner

Letter to Salvatore Adorno from
Roy Babitt dated October 22, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

ROY BABITT

October 22, 1973

Salvatore Adorno, Esq.
Krause, Hirsch & Gross, Esqs.
41 East 42nd Street
New York, New York 10017

Dear Mr. Adorno:

I have your letter of October 17, 1973, and as must have been clear to your Mr. Kruger, I am disturbed by it. I have no real objection if the debtor is willing to moot the Arthur Andersen & Co., appeal for paying voluntarily the amount which I disallowed or any part of it. But I cannot take the same position on the possible appeal by the indenture trustee and its attorney. I, therefore, direct that the debtor defend the latter, if an appeal is indeed filed, and further direct the debtor to advise me whether or not the Arthur Andersen & Co., appeal has been mooted. I expect the courtesy of an immediate reply.

Very truly yours,

s/ Roy Babitt

Roy Babitt

Letter to Salvatore Adorno from
Michael J. Crames dated October 22, 1973

LEVIN & WEINTRAUB
COUNSELORS AT LAW
225 Broadway
New York, NY 10007

October 22, 1973

Krause, Hirsch & Gross, Esqs.
41 East 42nd Street
New York, New York

Att: Salvatore Adorno, Esq. Re: FAS International, Inc., et al

Dear Sal:

I am in receipt of yours dated October 17, 1973 to Referee Babitt advising that the debtor does not intend to oppose the appeals of Whitman & Ransom, United States Trust Company and Arthur Andersen & Co.

It would seem incumbent upon the debtor to at least point out to the District Court whatever statutory or legal grounds that are pertinent with respect to the applications on appeal, so that the legal burden that ordinarily would be the debtor's is not foisted upon the court. If the debtor does not wish to oppose the quantum of these applications, that is one thing, but for the debtor to abdicate its responsibilities to set forth the applicable law is quite something else.

As co-counsel for the Creditors' Committee, you are aware that we have taken no position on the Andersen application for allowance, since that is purely a matter of quantum which lies within the sound discretion of the court. With respect to the applications of Whitman & Ransom and the United States Trust Company, we questioned from the outset the existence of any legal authority authorising compensation to them, and this will be our position in the District Court.

Very truly yours,

LEVIN & WEINTRAUB

By: s/ Michael J. Crames
Michael J. Crames

Letter to Hon. Murray I. Gurfein from Attorneys for the Debtor and Co-Counsel for the Creditors Committee dated Aug. 26, 1974

KRAUSE, HIRSCH & GROSS

41 EAST 42ND STREET
NEW YORK, N.Y. 10017

(212) 986-1122

CABLE ADDRESS
KRAUSHIRSH NEW YORK

August 26, 1974

SYDNEY KRAUSE
1928-1969
GEORGE J. HIRSCH
1928-1969

Honorable Murray I. Gurfein
United States District Judge
United States Courthouse
Foley Square
New York, New York

re: FAS International, Inc.

Dear Judge Gurfein:

Due to statements made in the first full paragraph of the reply brief submitted by Whitman & Ransom, attorneys for the indenture trustee and the appellant in the above matter pending before you, the undersigned counsel involved in said appeal deem it necessary and appropriate that you be advised of the following:

1. No agreement, oral or written, was or could have been made with respect to the payment of fees in the above matter, since any agreement is proscribed by statute.
2. Counsel for the debtor and counsel for the official Creditor's Committee advised counsel for the indenture trustee from the inception of this case that they did not believe the bankruptcy court had the power to allow fees to counsel for a indenture trustee in a Chapter XI proceeding, but that counsel could make an application for an allowance if they desired.
3. The positions stated in 1 and 2 above have been taken by counsel for the debtor and counsel for the official Creditor's Committee consistently throughout this proceeding, and the sole issue before you on this appeal is one of law as to

Letter to Hon. Murray I. Gurfein from Attorneys
for the Debtor and Co-Counsel for the Creditors Committee
dated August 26, 1974

2.

RE: G. TO Honorable Murray I. Gurfein
ED August 26, 1974

whether the bankruptcy court has the power
to allow a fee to counsel for an indenture
trustee in a Chapter XI proceeding.

Very truly yours,

KRAUSE, HIRSCH & GROSS
Attorneys for Debtor

By: Salvatore A. Adornato
A Partner

LEVIN & WEINTRAUB
Co-Counsel for Official
Creditor's Committee

By: William Kahn, Esq.
A Partner

cc: William Kahn, Esq.

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Letter to Jack Gross from Edward
Fein, dated November 6, 1973

November 6, 1973

Jack Gross, Esq.
Krause, Hirsch & Gross
41 East 42nd Street
New York, New York 10017

Dear Jack:

It was good speaking with you again.

Last Thursday I received from you copies of Mike Crame's letter to Sal and Referee Babitt's letter to Sal, both of which concern the appeal of Referee Babitt's decision denying payment of allowances to the Company's Indenture Trustee, United States Trust Company, and its counsel, Whitman & Ransom.

As I read Referee Babitt's letter of October 22, 1973, it contains an unequivocal directive ordering FAS International, Inc. to file an appeal in support of the Referee's opinion. As Don and I have discussed with you, the Company has no intention of acting in violation of a clear and unambiguous mandate of the Bankruptcy Court. Accordingly, the Company has no choice but to oppose the appeals of the Indenture Trustee and its counsel. You have advised the Company that the issue before the Referee was not discretionary but rather, was mandated by the express terms of the applicable statute. You have further advised that as a matter of law, even in the face of the most sympathetic of circumstances, the appellants' relief must be legislative, not judicial. However, you should know, and the Company's brief on appeal should recite, the following facts which underscore the need for a legislative change in this area.

As you will recall, in March 1973, the Indenture Trustee, on behalf of the Subordinated Debentureholders unsuccessfully sought the control of the Creditors' Committee. Despite this defeat, in the months that followed the Indenture Trustee's counsel participated actively and frequently in the discussions and deliberations which led to the formulation of the Arrangement which was proposed by the debtor in September, 1972. As you know, the Arrangement required the consent of the Debentureholders, voting as a separate class. It is clear on the facts that the Official Creditors' Committee did not act in a truly representative manner vis-a-vis the Debentureholders; the only voice in support of the subordinated debt was that of the Indenture Trustee by its counsel. In particular, the letter drafted by the Creditors' Committee urging acceptance of the Arrangement was initially to be sent to all creditors, whether or not subordinated. As you may recall, in January or February of 1973, the Creditors' Committee refused to solicit acceptances of the Arrangement from Debentureholders and refused to permit the debtor to include in its solicitation materials to Debentureholders, the Creditors' Committee letter recommending acceptance of the Arrangement. At that point in time, the Indenture Trustees' counsel, recognizing that the ab-

Letter to Jack Gross from Edward
Fein, dated November 6, 1973

Jack Gross, Esq.
November 6, 1973
Page 2

sence of a recommendation of acceptance by a creditor representative would be detrimental to the success of the solicitation, prepared for his client's signature a strong recommendation letter urging Debentureholders to accept the Arrangement. This letter was sent to all Debentureholders. Largely as a result of these efforts, the requisite majorities in number and amount of Debentureholders voting as a separate class were obtained. Don and I believe that the cited actions of the Indenture Trustee and its counsel were indispensable to the successful achievement of Confirmation of the Arrangement.

If, as found by the Referee, Confirmation of the Arrangement was in the best interest of all creditors and if, as suggested above, the necessary prerequisite to Confirmation (i.e., creditor acceptance of the Arrangement) was importantly brought about by the efforts of the Indenture Trustees' counsel, then it would seem appropriate for the beneficiaries of such counsel's services (i.e., the debtor's estate) to bear the burden of the costs associated therewith. It is most unfortunate that the law does not afford sufficient flexibility to permit these valued efforts to be compensated by the debtor's estate.

In many respects, this case has demonstrated that the remedy afforded under Chapter XI can be used flexibly to cover circumstances which might not have been in mind when the statute was drafted. In particular, in this case, a publicly owned Company was radically reorganized; a class of publicly owned Debentures was recapitalized; the equity interests of thousands of public shareholders were diluted; and a pending 10(b)-5 litigation involving a large class of public security holders was treated with. In taking these actions, all of the parties concerned exhibited a creative and flexible attitude toward the proper use of Chapter XI. It is most unfortunate that the statute precludes the utilization of a similarly flexible approach to the question of the legal propriety of the payment of fees to the Indenture Trustee and its counsel.

In looking beyond the instant case and trying to forecast what might happen in the next Chapter XI case involving publicly held subordinated debt, I cannot help but believe that the inequitable result compelled by the statute may cause most indenture trustees to urge the Securities and Exchange Commission to step in to protect the subordinated debtholders' interests through procedures available under Chapter X. Should this result eventuate, the flexibility and breadth of thinking which were evident throughout the instant proceeding and were essential to the Confirmation of the Company's Arrangement, would be vitiated.

Don and I would appreciate the opportunity to review, prior to the time of its filing, the brief which is to be prepared on be-

Letter to Jack Gross from Edward
Fein, dated November 6, 1973

Jack Gross, Esq.
November 6, 1973
Page 3

half of the Company by Sal. Should you have any questions or
comments regarding this matter, please call me.

Sincerely yours,

/s/ Ed.

Edward Fein
Senior Vice President and General Counsel

cc: Donald S. Lewis
Salvatore A. Adorno

In the Matter of Straus-Duparquet,
Inc. 65 B 181, Civ. Mot. Cal 5/10/66
No. 40

11 U.S.C. §737(2), which governs allowances in proceedings under Chapter XI of the Bankruptcy Act, does not provide for an allowance to an indenture trustee. The law is settled that the bankruptcy court lacks power to grant compensation which is not expressly provided for in the Bankruptcy Act.

Lane v. Haytian Corp. of America,
117 F.2d 216 (2d Cir. 1941),
cert. denied, 313 U.S. 580 (1941)

In re Ulen & Co., 130 F.2d 303
(2d Cir. 1942)

Guerin v. Weil, Gotshal & Manges,
205 F.2d 302 (2d Cir. 1953)

See Wolf v. Weinstein, 372 U.S. 633,
640 n. 7 (1963)

This principle was reaffirmed in Saper v. John Viviane & Son, Inc. 258 F.2d 826 (2d Cir. 1958), in which the Court stated (828):

"The policy of the Bankruptcy Act is best served by a conscious effort to reduce expenses of administration to a minimum."

The situation described in a dictum in that opinion as an exception to the rule has no application here.

These decisions are binding upon this court and preclude it from giving weight to the general principles of statutory construction and the arguments of policy which petitioner urges.

So Ordered.

Dated: September 20, 1966

s/

Edward C. McLean
U.S.D.J.

MICROFILM
Sept. 20, 1966
U.S. District Court
Filed
Sept. 20, 1966
S.D. of N.Y.

ANNEX A

OFFICE COPY ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter : 10-14-65
of : IN PROCEEDINGS FOR
STRaus-DUPARQUET, INC., : AN ARRANGEMENT
Debtor. : No. 65 B 181

APPLICATION OF CHEMICAL BANK NEW YORK
TRUST COMPANY, INDENTURE TRUSTEE, FOR
ALLOWANCE OF COMPENSATION AND DISBURSEMENTS

TO HONORABLE HERBERT LOWENTHAL,
REFEREE IN BANKRUPTCY:

The petition of Chemical Bank New York Trust Company (Chemical) respectfully represents:

1. Chemical is an indenture trustee of Straus-Duparquet, Inc., the above-named Debtor, under an Indenture executed between said Debtor and Chemical, as Trustee, as of May 15, 1961, pursuant to which Debentures in the aggregate principal amount of \$936,500 are outstanding, constituting claims against the said Debtor.

2. Chemical as such indenture trustee makes application for allowance of reasonable compensation for extraordinary services rendered to date and for proper fees and disbursements of Chemical's counsel incurred to date in connection with the proceeding for the arrangement of such Debtor and the pending Plan of Arrangement filed with this Court on September 9, 1965 (the Plan).

3. On April 19, 1965, Chemical filed a Proof of Claim on behalf of all holders of said Debentures in the amount of \$936,500 plus interest, representing the aggregate

ANNEX B

In the Matter of Straus-Duparquet, Inc.

continued services as Trustee and with respect to the Plan of the said Debtor for which it has not been paid is One thousand five-hundred (\$1,500.00) Dollars.

(b) Chemical has incurred to date counsel fees and disbursements in the total amount of \$5,307.27 in connection with the extraordinary services with respect to the continued operation of the trust and with respect to the Plan, as outlined in paragraph 4 above and as set forth in Exhibit A annexed hereto.

6. No previous allowance for fees, disbursements or expenses has been made to Chemical by this Court.

7. After the commencement of this proceeding, no beneficial interest, direct or indirect, in any claims against, or stock of Straus-Duparquet, Inc., the above-named Debtor, has been acquired or transferred by Chemical or for its account.

8. Chemical has not entered into any agreement, written or oral, express or implied, with the Debtor, receiver, trustee, or any other party in interest, or any attorney of any of such persons, for the purpose of fixing the amount of any of the fees or other compensation to be allowed out of or paid from the assets of the said Debtor.

9. Neither Chemical nor any person on its behalf in any form or guise has shared or agreed to share its compensation for services rendered in this proceeding with any person not contracting thereto or shared or agreed to share in the compensation of any other party rendering services in this proceeding to which services your petitioner has not contributed.

In the Matter of Straus-Duparquet, Inc.

principal amount of the Debentures outstanding.

4. Since March 15, 1965, the date of the filing by the Debtor of the petition in Chapter XI, Chemical has rendered extraordinary services to the Debtor and to the holders of Debentures, including preparation and mailing of reports and notices to Debenture holders concerning the Chapter XI proceeding involving the Debtor and developments in connection therewith, analysis of the financial condition of the Debtor for the purpose of determining whether it would be advantageous for the estate of the Debtor and for the Debenture holders to move to dismiss the Chapter XI proceeding and to transfer it to a proceeding under Chapter X of the Bankruptcy Act, the holding of meetings of Debenture holders at Chemical's offices for the purposes, among others, of advising the Debenture holders of the status of the proceedings and the nature of the proposed Plan, and to determine their views with respect to the advisability of moving to transfer the proceeding from one under Chapter XI to Chapter X, continued advice to Debenture holders concerning the status of the proceeding, attendance at hearings before this Court, attendance at meetings of the Creditors' Committee, correspondence, conferences, and telephone conversations with or concerning Debenture holders and representatives of the Securities and Exchange Commission, continual conferences with Chemical's counsel, and professional services of counsel for Chemical in connection with all of the above.

5. (a) The reasonable value of the extraordinary services rendered and expenses incurred to date by Chemical, as outlined in paragraph 4 above, in connection with its

In the Matter of Straus-Duparquet, Inc.

10. WHEREFORE, Chemical prays that an allowance be made to it in the sum of One thousand five-hundred (\$1,500.00) Dollars for extraordinary services rendered and in the sum of Five thousand three-hundred seven Dollars and twenty-seven Cents (\$5,307.27) for payment of proper counsel fees and disbursements incurred in connection with the continued operation of the trust and with respect to the Plan of Arrangement of the Debtor herein.

October 14, 1965.

CHEMICAL BANK NEW YORK TRUST COMPANY,
Trustee

By _____
Trust Officer

CRAVATH, SWAINE & MOORE,
Attorneys for Chemical Bank
New York Trust Company,
1 Chase Manhattan Plaza,
New York, N. Y. 10005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
In the Matter of

FOTOCHROME, INC.

No. 70B 209

----- x
In the Matter of

EASTERN CAMERA & PHOTO CORP.

No. 70B 210

COMPOSITE ORDER FIXING
ALLOWANCES
IN RE. CAPTIONED DEBTORS

* * *

5. MARINE MIDLAND BANK OF NEW YORK, Indenture Trustee

This applicant seeks a total allowance of \$34,294.24, consisting of \$4,376.54 for services rendered and expenses incurred together with the sum of \$27,917.70 legal costs billed by Sullivan & Cromwell, Esqs., attorneys for the indenture trustee.

Allowances in proceedings under Chapter XI of the Bankruptcy Act to an indenture trustee are not statutorily prescribed. Conversely, the statute contains no express interdiction relative thereto. Of import to the Court and bearing favorably on the issue of allowance is the

In the Matter of Fotochrome, Inc.

fact that the last amended plan of arrangement, Part B, subparagraph 2, provides as follows:

"The indenture trustee's compensation and expenses, including all legal fees of the trustee as approved by the court, shall be paid on confirmation."

The phrase, "as approved by the court" was added at the express direction of former Referee Sherman D. Warner, so as to indicate that the amount thereof and not the basic right to be compensated for expenses was subject to the court's discretion.

In the exercise of said discretion and in accord with the generic equity concept, I conclude that payment of expenses to the indenture trustee in this proceeding is justified and in harmony with the intent of Section 357 of the Bankruptcy Act. (12 (sic) U.S.C. Sec. 757), subsections (1), (6) & (8).

Having affixing a reasonable and fair value thereto, I considered and weighed the extent of the services rendered and the nature thereof. Foremost and of compelling weight is the fact that the applicant's services implemented the development of the plan. Apposite thereto, the favorable participation of the petitioner was crucial to the success attained.

Consonant with the above precepts and mindful of the

In the Matter of Fotochrome, Inc.

binding economy tenet mandated by decisional posture and precedent, I allow the indenture trustee the sum of \$15,000.00 as full reimbursement for costs and expenses incurred.

* * *

DECISION AND ORDER OF THE REFEREE IN BANKRUPTCY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SEP 25 1973

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In the Matter	:	ROY BABITT REFEREE IN BANK
of	:	MEMORANDUM/OPIINION ON ALLOWANCES
FAS INTERNATIONAL, INC.	:	13/B 128-139
Debtor	:	

-----x

ROY BABITT, Referee:

By separate opinion, the Court has fixed the allowances of those held by the statutory scheme of Chapter XI, Sections 301 et seq. of the Bankruptcy Act, 11 U. S. C. §§ 701 et seq., to be entitled compensation for services rendered in this now confirmed Chapter XI. Inasmuch as the Court has concluded that the application by Whitman and Ransom, as attorneys for the United States Trust Company of New York as an indenture trustee, and that by the indenture trustee for separate compensation must be denied for want of statutory ~~and~~ authority or equitable power to pay compensation from a debtor's estate, this separate opinion is necessary.

I need do no more than make passing reference

DECISION AND ORDER OF THE REFEREE IN BANKRUPTCY
to the decision rendered in the earlier days in these
proceedings to the effect that subordinated debenture
holders were disfranchised from voting for the election
of an official creditors' committee under Section 338
of the Act, 11 U. S. C. § 738, and which decision
became final without appeal. I also think I need do
no more than comment on the indenture trustee's
sterling services rendered for the beneficiaries of
the trust--the subordinate debenture holders. I am
willing to accept as a finding of ultimate fact that
it was by reason of the services by the attorneys for
the indenture trustee and by that trustee himself
which resulted in inclusion of that of creditors in
the debtor's arrangement proposals. Certainly the
debtor need not have accommodated subordinate debt
inasmuch as the primary debt was not being accommodated
in full. See In re Itemlab, Inc., 197 F. Supp. 194
(E.D.N.Y. 1961). Similarly, it may be assumed that the
indenture trustee performed fine services for the class
in keeping with the duties imposed on indenture trustees.

Accepting all of the allegations of the

DECISION AND ORDER OF THE REFEREE IN BANKRUPTCY

applications as truthful and lauding the conduct and quality of the services to the class of both counsel and the indenture trustee, I am of the view that there is no support in the Bankruptcy Act for compensation in the circumstances here present.

It is no longer open to doubt that the bankruptcy court lacks the power and the policy of the Bankruptcy Act is against compensation unless expressly provided for. Lane v. Haytian Corp of America, 117 F.2d (2d Cir. 1941), cert. denied 313 U.S. 580 (1941). Nor was that policy altered by any of the various amendments to the Bankruptcy Act which followed in the wake of Lane v. Haytian Corp., supra. Neither the 1952 amendment nor its 1967 progeny even remotely suggests that a struggling debtor is to be saddled with bearing the expenses of informal groups or classes of creditors. Nor can the indenture trustee prevail by an appeal to the broad equity power of the bankruptcy court, noted, inter alia, in Bank of Marin v. England, 389 U.S. 99 (1966) at 103. See In Re Max Fisman Inc., 27 F. Supp. 33 (S.D.N.Y. 1939). The relief sought here

DECISION AND ORDER OF THE REFEREE IN BANKRUPTCY

cuts so deeply against the grain of the policy of the Act that not even an appeal to an equitable conscience can allow it. Congress' efforts to overcome the restricted holding of Lane v. Haytian Corp., supra, in one amendment in 1952 and then in another in 1967, designed to overcome the weakness of the first, House Report No. 121, 90th Cong., 1st Sess. (1967), are clearly shown by the language Congress used.

The plain broad language of Section 339 must be given the plain meaning the words spontaneously yield. Those entitled to seek compensation for service to the debtor's creditors are strictly defined. The fact is that Section 339 of the Act contemplates services and compensation only to an official committee of creditors as provided for by Section 338, 11 U.S.C. §738; and the compensation for such agents, attorneys, and accountants as may be necessary to assist that committee in the discharge of its functions as set forth by subdivision (1) of Section 339 is authorized only in the event of a successful arrangement proceeding, i.e., only if the debtor's proposal is confirmed. That statute

DECISION AND ORDER OF THE REFEREE IN BANKRUPTCY

as it has evolved from at least two examinations by Congress in recent years expresses the limits to which Congress was willing to go.

In the absence of express authority in the statutes, the policy of the Bankruptcy Act dictates disallowance of those not clearly entitled to compensation.

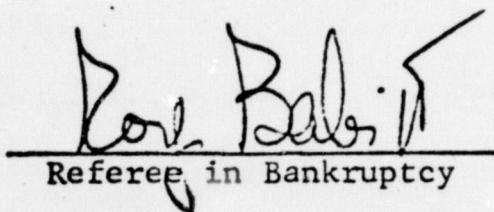
The fact of the matter is that the indenture trustee and his attorney labored exclusively for their beneficiaries-the debenture holders. Compensation to the attorneys of the trustee should come from the trustee. This is no different than the treatment given any attorney representing a creditor as his own client. It is to that client that counsel must look for compensation. It is clear that the interests of the indenture trustee and the beneficiaries ran counter to the interests of this debtor. To direct a debtor to compensate those who served their own clients in a cause antithetical to the debtor's would subvert the rehabilitative purposes of Chapter XI. Congress would have to speak much more directly to broaden the coverage given to the official

DECISION AND ORDER OF THE REFEREE IN BANKRUPTCY
creditors' committee.

The applications are both refused. It is so
ordered.

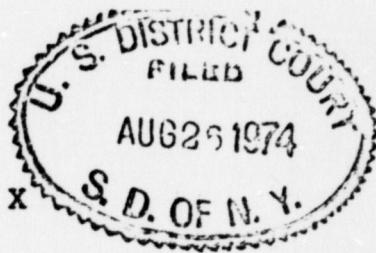
Dated: New York, New York

September 25, 1973


Don Belkin
Referee in Bankruptcy

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



In the Matter
of
FAS INTERNATIONAL, INC.,
Debtor.

72 B 128-129

X

APPEARANCES

WHITMAN & RANSOM
New York, N.Y.
Attorneys for Appellant

KRAUSE, HIRSCH & GROSS
New York, N.Y.
Attorneys for Appellee

GURFEIN, D.J.:

The United States Trust Company of New York ("U.S. Trust"), indenture trustee for \$16,500,000 of 5% subordinated convertible debentures of the Debtor, and its counsel, Whitman & Ransom, appeal from an order of Referee (now Bankruptcy Judge) Roy Babitt denying them allowances upon the confirmation of an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C. § 701 et seq.).

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

Judge Babitt in a memorandum opinion denied the allowances upon the ground that the Bankruptcy Act made no statutory provision for such allowances in a Chapter XI proceeding and that the Bankruptcy Court could not, under its equity power, enlarge upon the statute. The appellants contend ^{1/} that the question is one of first impression.

The facts are somewhat unusual. U.S. Trust was the Successor Indenture Trustee of the subordinated debenture issue described above. The Debtor filed a petition for an arrangement under Chapter XI on February 8, 1972. In addition to the unsecured subordinated debenture holders there were also unsecured bank creditors and unsecured trade creditors.

Shortly before filing the petition and immediately thereafter the Debtor negotiated with the consortium of bank creditors and with the trade creditors but not with the

1/ A brief was filed on behalf of interested banks and trust companies as amici curiae.

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

Indenture Trustee. The Debtor and the other creditors apparently took the position that, since the debentures were "subordinated" debt, their holders could have no voice in the negotiation of a settlement.

Appellant nevertheless sought proofs of claim from the debenture holders and attempted to vote the election of an official creditors' committee which would include debenture holders, and for the election of an ^{tentative} officer of appellant as/trustee. In the meantime it had retained the services of Whitman & Ransom, the other appellant, as its attorney on behalf of the debenture holders.

The first meeting of creditors was held on March 14, 1972. The attempt of appellant to vote its proofs of claim was resisted. The question of the right to vote the proofs of claim under Section 338 of the Act, 11 U.S.C. § 738, was submitted to the Referee who held that the debenture holders in the aggregate could vote only one claim. This, in effect, disenfranchised the public debt from separate representation on the official committee. An appeal from this ruling was not perfected.

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

Counsel for the indenture trustee was not without resources, however. Although the indenture provided for the assignment of the subordinated debt to the senior indebtedness in the event of insolvency of the debtor, he came up with the contention that, because of certain ambiguities of language in the indenture, the "subordinated" debentures might not be subordinate in an arrangement that contemplated the acceptance of common stock by the bank creditors. Suffice it to say that the argument of the Indenture Trustee prevailed to the extent that the "subordinated" debenture holders were recognized as a class which had not been wiped out because of the failure to make whole the creditors with priority.

Normally, subordinate debt is deemed worthless if the primary debt is not satisfied in full. See In re Itemlab, Inc., 197 F. Supp. 194 (E.D.N.Y. 1961). By virtue of their argument that they were not in fact "subordinate," the debenture holders were taken into the negotiations and

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

emerged with a part of the rehabilitated company for their own. The negotiations had taken place before the time to file a petition for review of the Referee's ruling had expired, and were conducted under threat by the debenture holders that they would pursue the appeal. An agreement was reached that the appellant would withdraw its petition for review and that the Plan would provide that the debenture holders would receive in the aggregate 196,092 shares of the common stock of the Debtor, representing about 20% of the stock of the Debtor to be outstanding after confirmation.

All unsecured creditors received stock and no cash. The Plan also provided for the election of an officer of the appellant as one of five directors.

Appellant further asserts that the legal fees incurred by the appellant were to be paid by the Debtor subject to the approval of the Bankruptcy Court. Counsel for the Debtor denies that any such agreement "oral or written" was ever made. No writing has been tendered in support of the alleged agreement.

2/

2/. There is no need to find whether a "firm engagement" was undertaken, for a debtor may not bind itself to pay for the services of committees other than the official committee. Lane v. Haytian Corp., infra.

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

In the fixing of allowances the Referee denied the applications of the Indenture Trustee and of its counsel for lack of statutory authority or equitable power. Both the Trustee and counsel brought this petition for review. The order of the Referee is confirmed.

The Court of Appeals for this circuit has enunciated the rule that "the bankruptcy court lacks power to grant, and the policy of the Act is against, compensation not expressly provided for by the Act" Lane v. Haytian Corp., 117 F.2d 216, 219, cert. denied, 313 U.S. 580 (1941); see also Guerin v. Weil, Gotshal & Mangen, 205 F.2d 302 (2 Cir. 1953). This rule was expressed in a proceeding for an arrangement in a Chapter XI proceeding. Unless Haytian has been eroded in this respect, the search must be limited to whether compensation is expressly granted under the Act.^{3/} Appellants concede it is not, but they argue that the Bankruptcy Court may, nevertheless, award compensation upon principles of equity. This requires a brief review of the provisions of

^{3/} Haytian was overruled in 1952 by an amendment to Section 337(2) and Section 338 to the extent that the Haytian court had barred payment to an unofficial committee for services rendered before the arrangement. See 8 Collier, Bankruptcy § 5.34 n.39; In re Casco Fashions, Inc., 490 F.2d 1197, 1202-03 (2 Cir. 1973).

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

Chapter XI and an inquiry into whether Congress intended to foreclose allowances to all except the official committee.

Section 333 of the Act provides for the election of an official committee of creditors to represent the interests of all unsecured creditors. Under Section 337(2) the Court fixes a time when the debtor is required to deposit "the actual and necessary expenses incurred. . . . by the committee of creditors and the attorneys or agents of such committee." As Judge Clark noted in Haytian, supra, ^{4/} these references are to a single committee. 117 F.2d at 219. ^{4/} Section 339(2) of the Act provides for the payment of expenses of such a committee and the fees of its counsel. The Act does not provide for the reimbursement of expenses or the payment of legal fees to any other person or body representing creditors in Chapter XI proceedings. ^{5/}

4/ While there have been amendments since 1941, they do not touch upon this point.

5/ I am aware that the Second Circuit has recently applied Section 62 as authority for an allowance of fees to the attorneys for a debtor in possession in an abortive Chapter XI proceeding in a subsequent bankruptcy. In re Casco Fashions, Inc., supra. Cf. Robinson, Wolas & Hagen v. Gardner, 433 F.2d 1104 (9 Cir. 1970). I think that where the arrangement has been confirmed, the statutory limitations in Chapter XI itself apply.

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

Appellants recognize that an Indenture Trustee was denied an allowance in a Chapter XI proceeding by our late brother Judge McLean in Matter of Straus-Duparquet, Inc., (unreported), No. 65 B 181 (S.D.N.Y. May 10, 1966), but they contend that the case is not analogous for the reason that the Indenture Trustee in Straus represented debenture holders who were not subordinated and hence ranked pari passu with other unsecured creditors. The inference is that the Indenture Trustee in Straus duplicated the work of the official committee because there was no conflict of interest between the debenture holders and the other unsecured creditors. Per contra it is suggested that, in view of the position of the debenture holders here as adverse to the other unsecured creditors, the official committee could not adequately represent them and, hence, they were entitled to separate representation in passing upon the adequacy of the Plan.

In addition to this equitable argument, the appellants suggest, and the amici curiae stress, that indenture trustees are generally not required under the indenture to provide legal services unless cash is advanced

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT
by the debenture holders, and hence disallowance of expenses
to the trustee will result either in inaction to the detriment
of the debenture holders or pressure to move the arrangement
into a Chapter X reorganization where expenses can be reim-
bursed and compensation allowed.

The argument really comes down to this. Since com-
pensation is allowed to an indenture trustee in a Chapter X
reorganization (Section 242 of the Act, 11 U.S.C. § 642),
(and in a railroad reorganization (Section 77(c)(12) of the Act,
11 U.S.C. § 205(c)(12))), in a particular arrangement, as here,
which happens to be appropriate for a Chapter X proceeding as
well as a Chapter XI arrangement, it ought to be recognized
that compensation should in equity be allowed in Chapter XI
just as it is allowed in Chapter X.

The argument is appealing, but it brings into focus
the relative functions of Congress and the Courts. I would
assume that, despite the rule laid down in Haytian, if it
appeared that Congress had overlooked a situation in Chapter
XI which was precisely the same as it provided for in Chapter X,
a court of equity, which the Bankruptcy Court is, Bank of Marin
v. England, 385 U.S. 99, 103 (1966), might supply the omission.

The difficulty with that solution is twofold,
First, although it is strange that Chapter XI, which was

6/ See Model Debenture Indenture Provisions of the Corporate
Debt Financing Project of the American Bar Foundation,
Section 601(c)(4).

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

supposed to take care of cases that were relatively simple, has now come to include, as a matter of course, arrangements where there is unsecured public debt, Congress has seen fit to leave the situation respecting compensation and reimbursement undisturbed. Petitions may be brought by the Securities and Exchange Commission or a party to move the proceeding into Chapter X. Section 328 of the Act, 11 U.S.C. § 728. If that is not done or refused by the Court, the debtor with an outstanding unsecured public issue can remain in Chapter XI.

Congress assumed, moreover, in enacting Chapter XI that there might be separate classes of creditors, for it provided that "the court may fix the division of creditors into classes and, in the event of controversy, the court shall after hearing upon notice summarily determine such controversy." Section 351 of the Act, 11 U.S.C. § 751. The assumption is that there might be controversy among creditors serious enough to require adjudication.

In spite of this recognition, the Act provides, as we have seen, for only a single committee, as distinguished from "committees" in Chapter X. (Section 242 of the

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT
Act, 11 U.S.C. § 642); Lane v. Baytian Corp., supra, 117 F.2d
at 219. This assumes that conflicting interests would be
subsumed under a single committee which is charged with
representing "the creditors" without exception. Section
339 of the Act, 11 U.S.C. § 739. The failure to provide
reimbursement and compensation to others than the official
committee does not appear to have been an oversight. If a
conflict of interest among creditors is enough to found
separate claims for compensation to their respective repre-
sentatives, the Act should be amended so to provide.

Second, so far as the equity power of the court
is concerned, it is still doctrine that expenses and allow-
ances by the Bankruptcy Court shall be limited to statutory
allowances. Appellants have cited no case, except a bank-
ruptcy referee's decision in the Eastern District, In the
Matter of Potosharsky, Inc., 70 B 209 (1972), where the
conceded equity powers of the Bankruptcy Court have been
used to award compensation without a statutory basis in a
Chapter XI proceeding. ^{7/} I agree with Judge Babitt that

7. Judge Friendly in In re Casco Fashions, Inc., supra,
relied primarily on a statutory provision, Section 62,
(11 U.S.C. § 102) to allow fees, in a subsequent liqui-
dation bankruptcy, to attorneys for the debtor in
possession in the aborted Chapter XI arrangement.

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

since Congress has decided who may be reimbursed and compensated, an equity court may not enlarge upon legislation which is both an expression of policy and unambiguous.

Even if an equity court should wish to venture into the legislative domain, it would be faced with problems. Is every indenture trustee entitled to compensation from the debtor's assets even though its debenture holders rank on a par with the other creditors? Is an indenture trustee who represents truly subordinated debenture holders entitled to compensation where the primary debt cannot be paid in full? Is a special case made where the debentures though in form subordinated contend that they are entitled to rank with primary debt? If allowances may be made to indenture trustees in Chapter XI, may they also be made to more than one committee of unsecured creditors as in Chapter X? The answers to these and similar questions are of the very essence of the legislative process. I believe they should not be determined by a court as part of its equity jurisdiction, since they involve policy questions within the framework of an integrated legislative scheme.

On petition for review, the decision of the Bankruptcy Judge is confirmed.

August 26, 1974.

MURRAY L. GURFEN

U.S.D.J.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x
In the Matter : :

Of : In Proceedings for Arrangement
FAS INTERNATIONAL, INC., : :
Debtor. : No. 72-B-128
- - - - - x
NOTICE OF APPEAL

UNITED STATES TRUST COMPANY OF NEW YORK (Successor
Indenture Trustee under an Indenture Agreement dated as of
January 1, 1969 between the Debtor (then known as Famous Artists
Schools, Inc.) and Manufacturers Hanover Trust Company, as
Trustee with respect to the issuance of \$16,500,000 of 5% Convert-
ible Subordinated Debentures by the debtor due 1989) appeals to
the United States Court of Appeals for the Second Circuit from
the order of Murray I. Gurfein entered in this case on August 26,
1974, denying such Indenture Trustee compensation and denying
compensation to the attorneys for such Indenture Trustee for
services rendered in this Chapter XI proceeding.

Dated: New York, New York
September 24, 1974

WHITMAN & RANSOM
Attorneys for Appellant
522 Fifth Avenue
New York, New York 10036
(212)575-5800

By s/ William M. Kahn
A Member of the Firm



NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS

TO:

Hon. Henry F. Werker
United States District Court
(Room 1603)
U.S. Courthouse
Foley Square
New York, N.Y. 10007

Hon. Roy Babbitt
Bankruptcy Judge
U.S. Courthouse
Foley Square, (Room 202)
New York, N.Y. 10007

Robert P. Herzog, Esq.
185 Madison Avenue
New York, New York

John Jerome, Esq.
Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, New York 10005

Salvatore Adorno, Esq.
Krause, Hirsch & Gross
41 E. 42nd Street
New York, N.Y. 10017

Michael Crames, Esq.
Levin & Weintraub
225 Broadway
New York, N.Y. 10007